

In the event I require additional arguments or information from the parties prior to issuing my proposed Findings of Fact and Conclusions of Law, I reserve the right to do so, and the right to grant the parties an appropriate amount of time to provide such information.

Also before me was the Motion for Continuance of the administrative hearing, which was filed by Clarence T. Guthrie, III, counsel of record for Respondent, Marshall Wolfe. Said Motion is hereby **GRANTED**. The administrative hearing is hereby postponed and will be rescheduled after I issue Findings of Fact and Conclusions of Law regarding those issues adjudicated on the pleadings.

Ordered and adjudged this the 20<sup>th</sup> day of May, 2010.

  
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HONORABLE E. CLIFTON HODGE, JR.  
Administrative Hearing Officer

**OFFICE OF THE MISSISSIPPI SECRETARY OF STATE  
SECURITIES AND CHARITIES DIVISION**

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In the Matter of:

Marshall Wolfe and Jack Harrington

*Respondents*

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Administrative Proceeding  
Number S-09-0187

**ORDER OF WITHDRAWAL AND PARTIAL DISMISSAL**

In accordance with the terms of the binding agreement reached by the Securities and Charities Division of the Mississippi Office of the Secretary of State, on behalf of Secretary of State C. Delbert Hosemann, Jr., and Respondents Marshall Wolfe and Jack Harrington, the parties hereby agree to the following:

1. Respondents, Marshall Wolfe and Jack Harrington, individually withdraw their requests to proceed with the live portion of the administrative hearing in the above-styled case. Such hearing, which was set for December 13, 2010, is hereby cancelled.
2. The Division hereby dismisses with prejudice, as against Respondents, Allegations 2 and 5 of its Summary Cease and Desist Order and Notice of Intent to Impose Administrative Penalty ("SCDO"), which was issued on January 26, 2010:
  - a. Allegation #2 (dismissed): *Respondents failed to abide by the "Source and Use of Proceeds" section of the PPM, which required investment funds to be used only in one of three categories: sales commissions, reduction of existing promissory note debt, and working capital. Respondents also failed to abide by their own promises to investors as to how investment funds would be spent.*



b. Allegation #5 (dismissed): *Respondents used misleading and deceptive forward-looking statements in the PPM, and made misleading and deceptive statements to investors regarding the financial stability of Steadivest.*

3. The parties acknowledge that the remaining Allegations (#'s 1, 3 and 4) set forth in the SCDO were adjudicated pursuant to the Findings of Fact and Conclusions of Law issued by the Hearing Officer on September 2, 2010, and the subsequent Final Order of the Secretary of State of Mississippi, which was issued on December 1, 2010. These allegations and the Final Order are not the subject of this Order and remain appealable in accordance with the applicable Rules and Statutes.

So ordered this, the 30 day of <sup>November</sup>~~December~~, 2010.

C. DELBERT HOSEMANN, JR.  
Secretary of State

By:

Melanie K. Thomas  
MELANIE K. THOMAS  
Senior Attorney

Date:

11/30/10

By:

Marshall Wolfe  
MARSHALL WOLFE

Date:

11/30/10

By:

Jack Harrington  
JACK HARRINGTON

Date:

11-30-10

By:

E. Clifton Hodge, Jr.  
E. Clifton Hodge, Jr.  
Administrative Hearing Officer

Date:

11/30/10



**OFFICE OF THE MISSISSIPPI SECRETARY OF STATE  
SECURITIES AND CHARITIES DIVISION**

**IN THE MATTER OF:**

**MARSHALL WOLFE AND  
JACK HARRINGTON**

***RESPONDENTS***

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**ADMINISTRATIVE PROCEEDING  
NO: S-09-0187**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY  
HEARING OFFICER E. CLIFTON HODGE, JR.**

I, the undersigned, E. Clifton Hodge, Jr., do hereby submit my Proposed Findings of Fact and Conclusions of Law with regard to certain pending matters in this proceeding.

**FINDINGS OF FACT**

1.

On January 26, 2010, Melanie Thomas, Senior Attorney for the Securities and Charities Division of the Mississippi Secretary of State's Office ("Division"), on behalf of Mississippi Secretary of State C. Delbert Hosemann, Jr., issued a Summary Cease and Desist Order and Notice of Intent to Impose Administrative Penalty (the "Notice") against Respondents Marshall Wolfe ("Wolfe") and Jack Harrington ("Harrington").

2.

The Division charged that Respondents had violated various parts of Mississippi law in connection with the sale of membership interests in Steadinvest, LLC ("Steadinvest"), a Mississippi limited liability company. The charges allege that Steadinvest began in January 2008 selling membership interests in the company ("the Offering") pursuant to a Private Placement Memorandum and subscription documents ("PPM") entitled "The Steadinvest, LLC Equity Offering."



3.

The Division charges the Respondents with five violations:

- A. Failure to meet the terms of the PPM because the investment funds were not placed in an escrow account and operating as a fraud in violation of § 75-71-501 (2) and (3).
- B. Failure to abide by the "Source and Use of Proceeds" section of the PPM.
- C. Using investment funds from the offering for personal gain.
- D. Failure to maintain adequate and required books and records of Steadivest's financial and operating activities.
- E. Misleading and deceptive forward looking statements in the PPM and misleading and deceptive statements to investors regarding the financial stability of Steadivest.

4.

On February 2, 2010, Harrington by his attorney, Michael Cory, issued a written request for a Hearing in this matter. On February 22, 2010, Wolfe, by his attorney Clarence Guthrie, issued a written request for a Hearing in this matter. On March 9, 2010, I was appointed administrative Hearings Officer in this matter.

5.

The Division requested that the Hearing be bifurcated, with three of the five issues contained in the Notice (A, C and D above) to be administratively resolved by a formal briefing process and the remaining two issues to be administratively resolved by live testimony and argument. On May 20, 2010, I approved the Division's Motion to Bifurcate. The parties accordingly made submissions on the issues to be resolved by the briefing process.

6.

The Steadivest Offering was commenced in January 2008. In connection with that offering, Respondent Wolfe on January 7, 2008, sent a "Dear Friends" letter in which he explained the plan to raise "ten million dollars of growth equity." Mr. Wolfe stated: "We will use these funds to build the robust infrastructure and hire the talented staff necessary to achieve our goals. Importantly, most of the new equity will not be spent at all." Mr. Wolfe further stated: "We are accepting new liquid investments into the company and offering you the ability to convert all (or any part) of your existing debt instrument to equity." The first two persons listed under the heading "Steadivest Management Team" are Marshall Wolfe, CEO and Jack Harrington, President and COO.

7.

The preliminary material distributed with the PPM states that the goal is to raise ten million dollars, 100 units at \$100,000 per unit. The first closing was to occur at \$1,000,000 according to this preliminary information. This preliminary material also projects over the first five years \$60,000,000 in revenues and \$20,000,000 in earnings.

8.

The following statement is in the Offering Memorandum on the unnumbered second page:

"Subscription payments will be held in escrow until the earlier to occur of acceptance of subscriptions for ten units or September 30, 2008. Assuming the minimum number of Units is sold this offering will continue through September 30, 2008 (unless extended by the Company for an additional 180 days)."

9.

The Offering Memorandum states that the Managers of the Company who are responsible

for the day-to-day operation of the Company are W. Marshall Wolfe, Jack Harrington, R. Patrick McRaney and Justin Adcock. With regard to books and records, the Offering Memorandum provides on Page 3 as follows:

“The Company will maintain full and complete records and books of accounts showing assets, liabilities and accounts of the Members, revenues and expenditures, and all other aspects of the operations, transactions, and financial condition of the Company. The Company’s books and records will be maintained at the principal office of the Company, and any Member will have access to the Company’s books during ordinary business hours and upon reasonable prior notice in accordance with the LLC Agreement.”

10.

The Notice charges that the Respondents failed to abide by the terms of the PPM which required funds to be held in escrow until September 30, 2008 or until \$1,000,000 in investments was raised, whichever occurred first. Respondent Wolfe replies to that allegation by asserting that there is no proof assigning personal responsibility to him and Harrington for the establishment of the escrow account. Wolfe Brief at P. 5. Likewise, Respondent Harrington asserts that there is no evidence that he was responsible for setting up the Steadivest escrow account. Harrington Brief at P. 9.

11.

The proceeds from the offering were, to some large extent, deposited in the Steadivest general operating account and then spent promptly thereafter. Neither Wolfe nor Harrington contends that an escrow account was, in fact, established. They merely say that they individually did not have responsibility to establish the escrow account.



12.

The Division cited many examples of how the proceeds were used in the business of Steadivest contrary to the escrow requirements and the PPM. For the most part, neither Wolfe nor Harrington replied with any specificity to such claims. Not only do Harrington and Wolfe disclaim individual responsibility for establishing and maintaining the escrow account, but also, and perhaps more importantly, neither indicates knowledge of or responsibility for how the proceeds were used.

13.

The Offering Memorandum should have disclosed more clearly that the predecessors had been losing a lot of money and needed cash to continue operating. The Offering Memorandum should have disclosed that the investment would go straight into the operating account where it would be promptly used to cover expenses which were exceeding income substantially.

14.

I find that both Harrington and Wolfe violated their responsibilities and the representations in the Offering Memorandum by allowing the proceeds from the Offering to go promptly into the Steadivest operating account and be consumed by the expenses which were spiraling out of control.

15.

Steadivest raised approximately \$1,585,000 pursuant to the Offering. Part of this amount was new cash in the company and part of it was conversion of promissory notes issued by related entities into equity of Steadivest. Although the Offering Memorandum mentioned that such conversions could occur, there was no full explanation of the amount anticipated to be raised by cash and the amount raised by conversion. Also, the possible conversions were not explained in any meaningful way. In any case, it is clear that most, if not all, of the new cash investment in Steadivest

was deposited into a Steadivest checking account at Regions Bank where such funds were then commingled with the Steadivest operating funds.

16.

On March 24, 2008 Steadivest transferred \$475,000.00 to MTW Investment Financing, LLC ("MTW"). That same day, MTW used \$461,770.95 to return the investment capital and pay off five prior MTW/Steadivest investors.

17.

The timing and amount of payment to Respondent Harrington on his promissory note is not clear. The Division claims that he was paid in excess of \$300,000.00 soon after the Offering was made in the early part of 2008. Harrington denies that he received the amount of money alleged by the Division at that time. He claims that he merely "rolled over" his promissory note to another promissory note which had less interest requirements than the initial note. However, Harrington admits that he received most if not all of the payment of that note when he departed the company in June 2008. Thus, even under Harrington's version of the events, he received a large payment which presumably came from the Offering. The possibility of that payment should have been described more clearly in the Offering Memorandum as any reasonable investor would have wanted to know that Harrington who was promoting the Offering himself would receive a large payment.

18.

Forward-looking statements of the type Steadivest put in the Offering Memorandum are allowed only if stated in good faith with a reasonable basis. The forward-looking statements included by Steadivest in the Offering Memorandum are outrageously excessive. To predict that Steadivest would have over \$80,000,000.00 of revenue in year five is so far off the mark that the

projection could not have been made on a reasonable basis. Although the Findings in this section do not directly relate to the three issues to be decided at this time, they help explain the nature and extent of the fraud.

19.

On March 23, 2009, Steadivest filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of Mississippi (Case No. 09-01013-NPO). It is clear that Steadivest was in deep financial trouble at the time of the Offering during the early part of 2008. This condition was not disclosed properly to investors. In the Notice, the Division specified several areas of the projections which were lacking in the proper foundation and substantially wrong. See Notice, Paragraphs 39 - 46.

20.

In addition to the erroneous information in the Offering Memorandum, Wolfe and Harrington gave "pep talks" to investors while Steadivest was in poor financial condition and headed toward bankruptcy. Again, the Findings in this paragraph 20 and the preceding paragraph provide background for the specific issues decided herein.

21.

The Division alleges that Respondents used investor funds for personal gain. The Division specifies credit card charges, airline tickets and salary increases. Except for the increase in Harrington's salary, the items specified relate to Wolfe. The Division specifies expenses that certainly seem to be personal in nature. The charges include purchases at Kirklands decorating store, Designer Warehouse, a trip to Disney World, a purchase of an Apple computer, personal telephone calls and restaurant charges. The Division contends that the Offering Memorandum should have



stated that some of the funds would be used for personal expenditures. The failure of the Respondents to answer the charges in their Response is significant.

22.

Respondent Wolfe contends that there is no proof that any expenditure described in the Division's brief is anything but a legitimate business expense. However, Respondent Wolfe offers no explanation of the expenditures challenged by the Division. He merely cites the internal revenue code general rule that for an expense to be deductible, it must be both "ordinary and necessary." Wolfe Brief at P 6. Wolfe does not explain how the expenditures detailed by the Division were "ordinary and necessary." Likewise, Respondent Harrington denies that he received funds from the offering for his personal gain. Harrington Brief, P 12. Harrington specifically denies that the payment to him on May 24, 2008 in the amount of \$306,302.99 was a personal benefit to him because it was a "note rollover where Harrington actually accepted a lower rate of interest." Harrington Brief, P 12. Respondent Harrington's statements in the Interview which was attached to his Response concerning the "payout" which he received from Steadinvest are confusing. He seems to be saying that the "payout" charged by the Division was actually a "rollover." This "rollover" did not, according to Respondent Harrington, provide any money to him, but instead left the debt from Steadinvest to him in place and resulted in a reduction of the interest which Steadinvest was supposed to pay on the debt. However, two months after this "rollover," Harrington received a payment of most, if not all, of the indebtedness. In the meantime, the debt was shuffled among related entities in a most confusing manner. When Harrington terminated his employment with Steadinvest in June 2008, he received a payment on this indebtedness. At that time, it appears that the Steadinvest companies were hopelessly insolvent.



23.

On Pages 8 and 9 of his Response, Harrington lists many items about which he claims there is no evidence to support the Division's assertions. But there is no doubt that Harrington's name was prominently stated in the Offering Memorandum. For example, Harrington states that there is no evidence that he was actually aware of any investment proceeds being deposited in an operating account. He further contends that there is no evidence that he was actually aware of bills being paid with Steadivest investment proceeds. He says that there was no evidence that he was actually aware at any time that the Offering was sent out that Steadivest could not pay its bills or could not afford to hold investment proceeds in escrow. But, if he did not know these things, he should have. He knew that he was presented to Steadivest investors as the chief financial officer and his business experience should have made him understand what most investors assumed that to mean. It was not proper for Harrington to allow his name to be used in the Offering, to meet with potential investors to promote the sale of the LLC interests and to know as little as he claims to have known about the operation of the company.

24.

Issue No. 3 in the Notice is a charge that Steadivest failed to maintain books and records in violation of representations in the PPM, and in a manner that caused a violation of § 75-71-501. During the investigation by the Division, Respondents repeatedly failed to produce requested books and records. Steadivest had represented in the Offering Memorandum that books and records would be kept. The deposition of Respondent Wolfe in the Bankruptcy proceeding demonstrated the lack of accurate books and records. Here again, notwithstanding the specific charges by the Division, Wolfe and Harrington came forward with nothing of significance that would explain the deficiencies

in the books and records of Steadivest. Steadivest did not maintain the books and records that it represented in the Offering Memorandum would be kept.

#### CONCLUSIONS OF LAW

25.

The Secretary of State has the power and authority to issue a cease and desist order and impose an administrative penalty under the provisions of Mississippi Code § 75-71-715.

26.

§ 75-71-501 makes it unlawful for any person in connection with the offer or sale of securities to employ a scheme to defraud, to make untrue statements of material fact or omit to state material facts and to engage in any act, practice or course of business which operates as a fraud or deceit on any person.

27.

The Secretary of State has the power and authority to issue a cease and desist order and administer a penalty for any act or practice which constitutes a violation of any provision of the Uniform Securities Act. The Secretary of State thus has the power and authority to seek the relief which is claimed in the Notice served on the Respondents.

28.

Three claims were designated for decision “on the papers,” to wit:

- A. Failure to hold proceeds of offering in escrow and operating as a fraud in violation of § 75-71-501(2), (3).  
 (“Issue #1”)
- B. Using investment proceeds for personal gain to defraud investors in violation

of § 75-71-501.

("Issue #2")

- C. Failure to maintain books and records in a material deviation from the representations in the PPM in violation of § 75-71-501.

("Issue #3").

#### ISSUE NO. 1

29.

The failure to place the funds in an escrow account was a violation of the representations in the Offering Memorandum. Also, the failure to provide an accurate description of the poor financial condition of Steadivest caused the Offering Memorandum to be erroneous and misleading, notwithstanding the boiler-plate disavowals and cautions. Persons seeking and obtaining investments for securities have an obligation to make a full disclosure of the facts material to the offering. That was not done in the Steadivest offering. The Steadivest securities were thus sold in violation of § 75-71-501.

30.

The maze of interrelated companies compounded the problems. The testimony of Marshall Wolfe in the bankruptcy of Steadivest is hopelessly confusing because even he did not understand the functions and relations of the entities, or if he did, he was unable to explain that in an understandable manner.

31.

There is no doubt that the collapse of the real estate market was a significant problem for Steadivest and all its related entities. However, Steadivest simply did not have the financial

resources and personnel to accomplish the plans which it tackled.

32.

If Mr. Wolfe and Mr. Harrington had caused Steadivest to make a truthful and complete disclosure, it is likely that no money would have been obtained from the investing public. And, of course, in that event there would have been no losses. But Mr. Harrington and Mr. Wolfe did not see to it that Steadivest made a full and accurate disclosure of the material facts.

33.

Both the Division and Harrington make statements in their submissions about the requirement of scienter. The 10b-5 cases uniformly conclude that a reckless disregard for the truth is sufficient to establish scienter. Mr. Wolfe and Mr. Harrington evidenced a reckless disregard for the truth in their actions related to the sale of Steadivest interest and to the operation of Steadivest and related entities.

## ISSUE NO. 2

34.

The question under Issue No. 2 is whether the Respondents used investment proceeds for personal gain to defraud investors in violation of § 75-71-501. The record is not presently sufficient to make a conclusion of law on Issue No. 2. The Respondents should have responded more specifically to the allegations about the personal expenses. However, after having found on Issue No. 1 that the Respondents violated Mississippi law in connection with the sale of the interests in Steadivest, it is not clear what would be added by concluding that the Respondents violated other sections. Thus, any further conclusions of law related to Issue #2 will have to await further proceedings, if any are to occur.



### ISSUE NO. 3

35.

It is clear that Harrington and Wolfe failed to maintain the books and records required by the representations in the PPM and by Mississippi law.

### ADMINISTRATIVE PENALTY

36.

The Division seeks administrative penalties against both Harrington and Wolfe. § 75-71-715 (2) (a) provides that the Secretary of State may issue an Order imposing an administrative penalty up to a maximum of \$25,000.00 “for each offense.” That Section further provides that “each offense and each violation shall be considered as separate offense in a single proceeding.”

37.

The Division suggests that administrative penalties should be awarded against Respondent Harrington and Respondent Wolfe, each in the amount of \$1,275,000.00. That number was evidently derived by multiplying the number of investors who bought interest pursuant to the Offering Memorandum (17) times the number of violations (3 submitted for ruling without a hearing) times \$25,000.00 (the maximum per offense). The Division is also authorized under § 75-71-715 (2) (a) to recover “all costs and expenses incurred in the investigation of the violation(s) and in the institution of administrative proceedings, if any, as a result thereof.”

38.

The amount of the administrative penalty should have some rational relation to the violation and should be adequate to serve as a deterrent to others. Obviously, there is no precise formula for the determination of the administrative penalty. While the violations are egregious, there are

mitigating factors such as the collapse of the real estate market. Perhaps an approach which would fit the situation better than the mathematical calculation done by the Division would be to have an administrative penalty related to the amount obtained in the Offering - \$1,585,000.00. Because of Mr. Wolfe's longer and greater involvement in the business, it would be appropriate for two-thirds of the administrative penalty to be attributed to him and one third to Mr. Harrington. Additionally, the Secretary of State should recover the expense of the investigation and this proceeding, split equally between Mr. Wolfe and Mr. Harrington.

39.

The amount of the administrative penalty should be determined by Secretary of State Hosemann after consultation with the persons on his staff who are responsible for enforcement and administration. As suggested above, the proposed administrative penalty of \$1,275,000.00 on Mr. Harrington and Mr. Wolfe seems excessive to this Hearing Officer. It is proposed that the administrative penalties should be determined by Secretary of State Hosemann and that it would be reasonable to have the penalties determined in relation to the \$1,525,000 raised in the Offering. Also, it seems reasonable that Harrington and Wolfe should be charged with the expenses of the investigation and this proceeding.

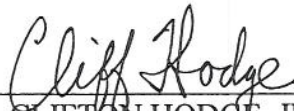
40.

Two of the five parts in the original Notice have not been briefed and heard, although as indicated above some of the matters related to the other offenses provide background for the two parts addressed herein. Two of the three parts addressed herein are resolved in favor of the Division. The third part is not fully decided because more facts are needed to determine which expenditures personally benefitted the Respondents.

41.

In light of the recommendation of an administrative penalty based on the violations determined herein, the parties need to determine how they need to proceed on the pending charges.

This the 2<sup>nd</sup> day of September, 2010.

  
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E. CLIFTON HODGE, JR.,  
HEARING OFFICER